

# Marriage and Divorce

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## MARRIAGE AND DIVORCE.

Marriage is defined as the "legal status" or condition of husbands and wives;" just as infancy is the legal status of persons under age." A marriage is the combination of acts by which a man and a woman become husband and wife ." This definition is taken from the American and English Encyclopedia of Law.

Marriage is the natural outgrowth of the sexual desire, common to mankind as well as to the lower forms of life. Undoubtedly the primitive mating of the sexes was only temporary in its duration, although scientific investigation has proven that mating for life is not unknown among some lower animals, and one authority states that we find perfect and life-long mating of the sexes among the birds.

Passing over the subject of the growth of the sexual differentiation we are led to adopt the conclusion of those who have investigated that subject--that the progress of civilization depends more largely upon two original forces, undoubtedly, than upon any others<sup>y</sup>, namely; "The need of nourishment and the sexual and pairing impulse. It requires no evidence to convince us that at the basis of life is nourishment -hence its demand is the more imperative~~while~~-; while the sexual and mating or pairing impulse grows with civilization and the development of the nervous system, and is second only to the greater struggle for food as a force in the genesis of society".

of man  
Kinship<sup>^</sup>with the lower animals can easily be traced by his habits of mating. Westermarck maintains that marriage was probably transmitted to man from some ape-like ancestor and that there never was a time when it did not occur in the



human race." Henreaches the conclusion . He reaches the conclusion from the fact that marital relation is entered into by the lower animals as a sort of economic provision in the struggle for existence ,and upon this economic basis may be explained the habit among animals of remaining together for long periods of time,rather than upon that of mutual sexual attraction.

Marriage is connected with parental duties and it is for the benefit of the young that the male and the female continue to live together ." Hence comes the idea that a child born out of wedlock makes it obligatory for the parents to marry", and consequently ,marriage is an outgrowth of the family,and there has its foundation, rather than the family arising from the ~~marriage~~ <sup>marriage</sup> as is commonly presumed.

As to what was the earliest form of marriage is a question upon which there has been much controversy and concerning which there are different opinions, That promiscuous

living together was the prevailing primitive method is held by some scientists, but the evidence is the stronger which goes to refute this idea. Various reasons, physiological and psychological why this mode could never have been common have been established. Westermarck, after careful examination of the evidence tending to show that ancient races lived promiscuously, says: "this theory has been unable to stand the test of the investigation, and that there is not a thread of genuine evidence ~~why~~ for the notion that promiscuity ever formed a general stage in the Social History of Mankind".

However, polyandry and polygyny have existed and do still prevail to some extent.

Among the ~~primitive~~ races Marriage as we regard and consider it did not exist, and the definition given at the beginning of this article would not apply. In their low modes of life the relation of the sexes bore an indefinite and

unsettled character, with nothing to guide save the instinct of the moment--no thought of responsibility, no idea of preparation for the contingencies attendant upon their acts.

So far as we know the earliest forms of union were simply the mutual agreement of the parties--the simple mating, as those of the birds or the beasts. There is no word in their rude and simple languages expressing the idea of marriage. The earliest ceremonies indicative of the marriage relation was the mere commencement of the living together of the man and the woman; sometimes a violent seizure --a capture of the woman by the man, and the forcible taking instituted the marriage; sometimes a simple act of household work, or a tender of something--as of tobacco by the maid to the suitor--or the partaking of a meal together constituted the marriage ceremony.

McLennan holds that marriage by capture is a universal rule of practice of obtaining wives among primitive races, but

about this theory there has been much discussion. It is not at all improbable that in the conflicts among savage tribes women were captured as were other chattels, and that they sometimes became the slaves, sometimes the wives of the captors. Many examples are given of women being taken in war. An interesting account is given in Judges, Chapters XX and XXI. Everywhere men in their hostilities with each other have been guilty of gross immorality towards women, but there is no semblance to marriage in their brutal treatment and forced manner of gaining submission over women. Letourneau declares and rightly insists that "so-called marriage by capture is not a form of marriage at all, it is merely a manner of procuring one or several wives, whatever the matrimonial system in war."

Sometimes in obtaining a wife the favor of the parents or in case the parents were dead, that of the sisters or brothers, or others in charge of the desired maiden is gained,

by a bestowal of presents . Among some tribes, the suitor-like Jacob-served the parents of the bride for a given time for the hand of the daughter, and in addition to his service he must also capture the fair one. Thus we have wife getting by capture and by service combined. In closing the treatise on wife-capture Howard says: "It has nothing whatever to do with the institution of marriage. It could never , on any wide scale, have been the normal manner of procuring wives. To assume that wife-stealing has been a universal phase in the evolution of marriage is not one whit more reasonable than to hold that robbery has been a normal stage in the evolution of property. There is strong reason to believe that in every period of social development consent and contract, in some form , have been the cardinal elements of marriage. Captured or stolen women have usually become slaves or concubines; and, except in rare instances, the relatively small number of them

made wives must always have been insignificant as compared with the number of wives obtained in other ways. Thus the solution of the problem of so-called marriage by capture appears to be similar to that of polygyny, The practice of taking several wives is exceedingly common; but on closer examination we discover that polygyny is relatively unimportant and that it has never been able to displace monogamy. So it is with the practice of capturing women for wives. However prevalent the custom, it does not seem ~~ever~~ ever to have greatly influenced the natural laws, or modified the fundamental motives upon which marriage and family rest.

In considering the obtaining of wives by purchase a number of authorities regard this method as an indication of a higher stage of development among the races in the primitive state,--a growth into a larger life than existed when wife capture was practiced, and also regard it as a mark of transition from the maternal to the paternal system of kinship.



Some authorities hold that it is a universal phase of development, displacing marriage by wife-capture, but Spencer not so considering it, regards it as a method substituted for stealing or abducting the bride--a seeking to gain the consent of the parents by gift or purchase rather than incur their wrath by theft; following logically, the method of obtaining other property--as a ~~more~~ more civilized way than by theft or robbery. However that wife-purchase is the outgrowth of wife-capture does not follow as a rule, for all mankind or for one race or for one community, for robbery is not the only manner ~~as~~ aside from purchase, of obtaining property. Procuring wives by capture and by purchase appear side by side and among peoples exceedingly low in the scale of development, while wife purchase appears also alone among very rude people, wife capture not being known among those tribes. Close observation and examination give conclusive evidence that the

purchase-contract is the exceptional method, and "even illegal."

Savage races sometimes steal wives from hostile tribes; the Macas indians of Ecuador purchase their wives if of their own people; if taken from other tribes they acquire them by force. It is shown by Mr. Spencer and other authorities that marriage with a captured woman is permitted only when both captor and captured are of tribes between which marriages are legal, and for violation of the rules of the groups in this respect death is sometimes the penalty.

If we believe the songs of the primitive races we cannot doubt that love and choice have much to do in match-making among the native Australians and other primitive races.

In marriage by purchase the prices paid and the manner of tendering the same are regulated by the customs of each particular race or people. As a conclusion in regard to wife-purchase being an outgrowth of wife-capture Howard says:  
-17- It appears then, so far as present investigation enables us

to determine, that there is not sufficient evidence for assuming that wife-capture, except in isolated cases, has generally grown into marriage by purchase. As a rule, even among the lowest races, foreign or warlike capture is an exceptional method of procuring wives; while bride-stealing at home, though the symbol may sometimes be sanctioned, is merely looked upon as illegal or even immoral; and, therefore, with advancing civilization it yields to contract as the highest means of effecting a marriage. Some authorities declare that the custom of wife-purchase has passed away, but recent researches show that bargaining is a 'familiar institution in many parts of the world.' The simplest way, says Westermarck, of bargaining for wives, is "to give a kinswoman in exchange for her." An incident which came recently under my observation goes to show that the trading for a wife by giving a kinswoman in exchange is still prevalent in Bohemia, to some extent. A young

Bohemian wife brought suit for,divorce from her husband. The grounds for the divorce I do not remember at this time ,nor is it pertinent to this illustration that I give the reasons alleged in her petition. The evidence showed that, on her part, the contract of marriage was a forced one, one brought about by the parents, or rather of the fathers of the bride and the bridegroom; that ~~the~~ a brother of the wife had married a ~~siste~~ sister of her husband; that the father of the husband had said to the father of the wife, "I gave my daughter as wife to your boy, you ought to give my boy your daughter as wife in return." In this way a very unhappy alliance had been formed, so far as the wife was concerned and she sought the interference of the Court in her behalf. And I am pleased to state that she gained the absolution sought.

In obtaining ~~service~~ wives by service the length of time of service and the manner of the service differed with the various tribes in which that custom prevailed. Spencer says

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this is a higher stage in the development of the marital relation ; that a "wife long labored for is likely to be more valued than one stolen or bought." This method, Howard says, is prevalent among such rude races as the Bushmen, the Fuegians, and it "seems almost probable that marriage by service is a more archaic form than marriage by purchase, but generally they occur simultaneously." In all the Semitic races marriage has been at sometime, a matter of sale and purchase. Wife-purchase "appears essentially as a real contract of sale between third parties", the bride and sometimes the bridegroom having nothing to say in the matter. The purchase price at first is paid to the father of the bride, but in ~~this~~ time this "purchase-price becomes a ceremonial conveyance, and the bride-price disappears in the dower, which is a fact of great social and legal import."

The question whether wife -purchase was preceded by wife-capture as a general phase is one of importance, if not,

is wife purchase the "primitive method of contracting marriage? or "what is the antiquity of mutual agreement as the basis of matrimonial union between a man and a woman?" "Marriage by purchase indicates a growth in the idea of the value of property the same may be said of wife stealing or wife-capture, in a degree. It implies an appreciation of the economic value of woman's services," and an idea which is not consistent with man's primitive condition. There are strong indications that among the primitive races unions were made by mutual consent. Post says "among very low races betrothal is a compact between the bride and the bridegroom." Then marriage is changed from "an individual relation to a relation between ~~for~~ families " and the betrothal is an agreement formed by third parties. Then it develops into an individual matter, a contract between the bride and the bridegroom. In this regard the highest and the lowest stages of social development present like conditions. Westermarck sustains this theory of Post in a most



conclusive manner; he has enlarged on the idea that in the primitive races the female has a wide liberty of choice ,as among the lower animals;"He says,"that everywhere ,with few exceptions the male is the wooer." The male birds are provided with more gorgeous plumage,more musical and louder notes than the female, by means of which he may attract her; so also,the males of the lower animal<sup>kingdom</sup> attract the females by their call and by their attractive form and color. This feature is carried out among men. In the human race ,among the savages the men discolor themselves and make display for the attraction, at least in part,of the women. The savage Indian trims his hair after a certain fashion,paints his face and partly shaven head ,wears glittering rings in his ears,and nose,that he may be attractive to the more sombre appearing squaw. The men of other savage tribes have their peculiar forms of attraction for their women. It has been shown by those who have investigated the question that the primary purpose of

self decoration among the savage races is the stimulation of sexual passion. The "common notion that women are by nature vainer and more addicted to decorating themselves than men" is not true among the savage and barborous peoples. As a general rule it is the man who is the most desirous of pleasing the opposite sex. A Maori proverb says; "Let a man be ever so good looking, he will not be much sought after; but let a woman be ever so plain, men will still eagerly seek after her." This tends to show that among the early races women had a large liberty in the choice of a husband or mate.

If the law of selection <sup>is</sup> ~~is~~ that in primitive races women had the right of choice, and man had always to be the wooer, it would be strange if she did not preserve some "liberty of choice in marriage". But savage man has kept woman in far more abject and dependent position than have any of the animals in the lower kingdom" and has largely gained to himself the power of selection.

But we can not arrive at a full knowledge of the most primitive races. The facts are unattainable. Those of the lowest we know about have advanced far above the primordial condition, but the facts obtained show that women often exercise a "decisive though not always a legal voice, in the choice of a husband."

Howard, in closing the treatment of the subject of the "marriage contract" says: "We have now traced the evolution of the marriage contract throughout its entire course, and are able to perceive in a measure its true place in the history of the human family. Again the movement has been in a circle. As in the case of monogamy, the genesis of contract must be sought beyond the border line between ~~man~~ and the lower animals. In the "natural history" stage of human existence marriage rested on the free consent of the man and the woman. It was an informal agreement. The man was the wooer and

to the woman belonged the first place in sexual choice. In obedience to the unvarying requirements of organic law, the best attributes of each race have thus been differentiated; through natural selection they represent the survival of the fittest. At a later stage of development the element of mutual consent falls somewhat into abeyance. With the rise of property, industry, and a more complete social organization, giving birth to new desires and ambitions, contract by guardian in part superseded self-betrothal. Purchase and its occasional alternative, capture, depriving woman of her natural <sup>right of</sup> assent, tend to reduce the wife to concubinage and domestic slavery. But fortunately the victory is not complete. Just as Monogamy is never displaced by Polygyny as the natural type of marriage, so the consent of the woman as the normal condition of matrimonial union is never destroyed by wife purchase. With the evolution of altruism, the increase of culture, producing sympathy upon

which connubial love largely depends, and the gradual recognition of the spiritual equality of the sexes, self-betrothal, like monogamy, again predominates. In short, whether regarded as historically or biologically, monogamy and self-betrothal appear simply as two aspects of the same institution; they are connected by a psychic bond, and together they constitute the highest type of marriage and the family."

Our English ancestors may have captured their wives; the greater weight of evidence, however, points to wife-purchase as being the method which obtained among them. With the English and other Teutonic races, "at the dawn of history marriage was a private transaction; the father or other guardian making the sale of the bride to the bride-groom. This transaction consisted of two parts--the "bewedding or betrothal", which was a real contract of sale--the bridegroom paying the price of the

bride, the person of the woman being the object of sale, and purchase--and she remained in perpetual tutelage, the guardianship of the husband taking the place of that of the father or other guardian. Woman, however, in this mode of marriage was not a mere chattel, for she had a certain degree of choice, and the weotuma or Witthum, or bride-price must not be regarded as the price paid for protectorship. There are different opinions as to the meaning of the bride-price--some holding that it was the price of the protectorship, others that it was the real sale price, differing but little, if at all, from the price paid for a slave. Important as the real meaning may be the powers of the husband over the wife were so great that it could have made little difference in her condition--it may have had a somewhat higher ethical sound than had it been understood as not meaning the real price of the bride. In Germany "to buy a wife was a familiar phrase for marriage throughout the middle ages."



So far as legal records take us back in the history of marriages in England the price of the bride was fixed by statute or by custom, depending upon the rank of the woman to be sold. At an early date it became customary to pay a part of the price at the betrothal as a guaranty, the rest of the price to be paid at the time of the marriage. This gift, or arrha which was made at the time of the betrothal, however, was the act by which the real obligation came into being -- it was a promise or pledge to be fulfilled in the future, and no part of the gift or price to be paid at the time of the marriage itself. This method gradually brought about a change in the marriage customs among all the German tribes, and finally the wittum, the price of the bride was no longer a price paid to the father or guardian of the bride, but was paid to the bride and became a fund or provision for her widowhood, to be paid her upon the death of her husband should she survive him. The

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bewedding was still a contract but not a "contract of sale", but rather as a pledge of the bride to the bridegroom and of him to her. The "arrha" afterwards became a mere agreement "accompanied by sureties", to pay the weotuma or wedding gift to the bride, and this provision created the obligation and was an essential part of the contract. There was originally the giving and taking of a straw or other object, on the part of the bride and bride-groom. The oath or vow became afterwards substituted for any formal act; the betrothal and wedding gifts being merged into a legal provision for the widow. "Such was the Lombard Quartia, and the Frankish "tertia" and other provisions; the predecessors of the modern dower."

First then, we have in the time mainly, if not wholly within the prehistoric era the betrothal as a real contract in which there is a two-fold obligation--the payment of the price by the bridegroom to the father or guardian of the bride, and the delivery of the bride at the same time, Second- from the

time of Tacitus,"the transaction is still in form a "real contract of sale" but there is only a one-sided fulfillment, the purchase-price is paid to the guardian but the giving of the bride is delayed to another time. Third-we have a solemn act in which there is paid a small sum ,the arrha,the payment of the real purchase-price being reserved until the solemnization of the nuptials,and then often paid to the bride; in which we recognize the beginning of the dower. Finally we have a betrothal in which nothing is transferred at the betrothal,but promises are made and sureties are given for their fulfillment by the guardian and bridegroom.

It must be understood that the real gifta ,or giving of the bride to the bridegroom is a separate and distinct transaction from the betrothal. The ceremony takes place in the home of the bride . The father or guardian is the principal character in the proceedings and is the "prototype "of the

"modern magistrate" or priest. First in the ceremony is the solemn surrender of the bride of all her rights and powers, (designating her complete subjection by the proper symbols), being handed over to her husband; the bridegroom, on reception of the bride, pays the weotuma or delivers the proper evidences of his provision for her should she survive as his widow, and at the same time gives some symbol, treads on her toe or some trivial act is performed, indicating his authority over her; which emblem grew into the custom of giving to the bride a shoe or slipper.

Some authorities held that the betrothal was the "essential part of the marriage itself;" that in this is the making of the contract, the coming together of the two minds—essential to every contract—the formation of the husband's title.

Either party can bring an action in Court to compel the payment of damage for breach of the contract; the betrothal created the obligation, "the gifta conveyed the positive rights,

the power of the husband over the wife, her property and person! There seems little ground for considering the betrothal<sup>as</sup> being the part most essential in the marriage contract. For marriages were made when there was no formal betrothal, when the wife was secured by capture, and the betrothal was not such a contract in law as could be enforced.

From betrothal by the parent or guardian there came a time when the consent of the maiden was asked, wherein she could use her veto power, and from that gradually the custom grew when the daughter betrothed herself and the father or guardian was asked his consent, and had the veto power only. For the outgrowth of the latter custom we are indebted to the widow, for she first dared to disregard parental authority in respect to her marital arrangements.

Canute forbade the sale of a maiden as a wife and also her marriage against her will, The betrothal made by herself

and her suitor was binding but as a punishment for disregarding the wish of her parents in this respect she might be disinherited. Thus we find the beginning of private marriages, which afterwards, as "irregular" or "clandestine" marriages played so important a role in the history of matrimonial law.

In self-betrothal the mutual pledge, the wed, is the contract, although the arrha usually in the form of a ring, is retained as a form of the real contract. The Germans seem to have borrowed the ring as well as the bridal wreath and bridal veil from the Romans, and whether the ring is an emblem of the former servitude of the wife must depend upon the acceptance or rejection of the idea as to the actual sale of the bride prior to those times. Some claim that it was a badge of servitude, others deny the assertion and maintain that it was a mere badge of good faith between the father and future husband of the daughter, nor, was it the only symbol of this



nature given. The ring proved "not that marriage was a sale but that it was a civil contract executed according to the strict formalities of contracts in primitive law, it proved- not that women were deprived of rights but that their rights were secured to them in marriage by the most careful provision known to early society". Although this emphatic statement may speak the truth yet the ring may mark an intermediate stage in the evolution of the self-betrothal from the custom of her sale, without reference to her wishes in the matter. Of special interest is it that the English speak of marriage as a wedding, and the ring is used in the sense "to wed the bride

Along with self betrothal came the custom, the right, of self-gifta, the parties having the right to conduct the ceremony themselves. In place of the father or guardian, who formerly performed the marriage ceremony, ~~the father~~ -- "a chosen guardian" was often selected by the bride or by the couple to be married who performed the ceremony of marriage . This

person might be any one whom they might select. In the 11th. Century an orator or "Fursprecher" acts as assistant and dictates the ritual and takes charge of the ceremonial proceedings. Some authorities claim that <sup>the</sup> assistant was the precursor of the priest and civil officer among whose duties is that of the performance of the marriage ceremonies. Other authorities hold that the functions of the priest and civil officer or magistrate "are an outgrowth of the duties of the "chosen guardian", as the assistant had nothing to do but only to speak-assist another. However, that is not material here.

From about the beginning of the 13th. Century self gifta was the only form of celebrating the nuptials. Gradually the symbol indicating the surrender of the rights of the wife to the husband were omitted. The couple simply declared in the presence of witnesses, their vows of betrothal as a guaranty of the existence of a contract; the ceremony of the

giving away of the bride passed into a declaration of their union.

Marriage traced thus far has not yet become a civil marriage, according to the modern meaning. There is not trace of public license or registration, no one with public authority presides at the solemnizing of the nuptials. It is simply a private matter of business in which the guardian gives the bride and conducts the ceremony or the marital vows are repeated by the contracting parties themselves, in the presence of a few friends and relatives, the only means of publicity required or provided for.

Out of asceticism ,unfortunately,arose the Christian conception of marriage,and out of this source came the long period of the disgraceful attitude toward marriage . 'Obscurity and perplexity'prevailed where there should have been 'clearness and simplicity.' When there should have been publicity 'secrecy was invited.' The church was ready to assume all responsibility in the 'supervision of marriages and the development of matrimonial law ". Slowly the time came around when the priest was clothed with authority to solemnize the marriage vows; but before this time,which was in the Thirteenth Century ,the church,save in the betrothal,was taking sole possession in the regulation of marriages.

The prevailing idea of this time was that celibacy was much more holy and pure than was marriage. The purity of

marriage was admitted with an apology, tending to show the attitude of the ascetic mind. It was held as a sacrament and yet regarded as a remedy for an unholy manner of living, and for this reason it was made easy to enter into the marriage relation. Marriage being less holy than celibacy, a premium was placed upon the celibacy of the clergy, the members of the monastery and the convent.

In England this state was not enforced until the days of Dunstan, but finally asceticism gained the ascendancy and he who would take orders, if married, must put away his wife. We need not here trace the growth of the idea that to remain unmarried and childless was far more honorable and praiseworthy than to marry and be the parents of children, nor to trace the growth of the low estimate in which woman was held. Lamentable it is that such notions ever gained so strong a hold upon the church. The idea of helpfulness, companionship

and comfort which prevails to-day in the relation of the sexes, hardly had a shadow of existence then. However, that there was a shadow, a mere beginning of the higher idea of family life beginning to show itself in the early Christian family there is little doubt. Whatever causes led to the low estimate in which woman was held, the notion that she was the cause of "original sin", has been, undoubtedly, the greatest and upon this ground if no other, may be explained in a large measure, the attitude of the church toward her, and consequently the low estimate placed upon marriage.

Notwithstanding, by the Twelfth Century marriage was regarded as a sacrament by the church, as one of the "holy mysteries" and as a result of this holy nature of marriage, the tie when formed, was disregarded as indissoluble, and over its functions the church must have absolute jurisdiction. In England between the Seventh and Twelfth Centuries the "ecclesiastical authority

in matrimonial affairs was slowly established " and the marriage law of England was the Canon law." The Canon law, although it rendered the marriage easy in its formation, made its dissolution exceedingly difficult to obtain. On account of the laxity in regard to the requirements of marriage, clandestine or secret marriages grew to be a great evil, a great menace to the stability of the family and society. Much alarm was created concerning the abolishment of this danger. The mere betrothal, formed by "*in*sponsalia de praesenti"; the woman and man making a declaration that they take each other to be husband and wife was regarded as a valid marriage and one not easily dissolved. Although either party might be released from its obligations by taking an order in the church, but *it* would not be broken by either party entering into wedlock with another person. Much confusion was thus created, and the civil regulations were of little avail for the church steadily

refused to make the validity of marriage depend upon forms and "conditions such as the civil law prescribed". Neither parental consent nor definite age was required. "No religious ceremony nor record nor witness was essential." A private or even secret agreement of the betrothed couple constituted a valid contract. This the conflict between a valid and a legal contract arose and created great confusion. The Council of Trent sought to remedy conditions in relation to marriage by requiring, among other provisions, that the marriage ceremony take place in the presence of the priest and "two or three other witnesses," but did not require also the publication of banns or the registration, or benediction. Both before and after the Council of Trent, children, without the consent of parents, or even against their will might enter the bonds of matrimony upon reaching the age of puberty. The idea of marriage being a sacrament hindered the Council of Trent in



passing any act which would tend to restrain secret marriages; for how could legislation obtain against a holy mystery? Thus the very measure sought, the restraining of secret marriages, was defeated and a greater license for the evil was gained; the determination of the legal status of a man, woman or child, often was a difficult matter. The confusion created by the terms "sponsalia de praesenti" and "sponsalia de futuro", produced many snares in the marital relation, and frequently parties binding themselves to wed, forming a mere betrothal, were held to be validly married and indissolubly united when a more binding contract might exist between the same party or parties to this betrothal and other parties respectively, between whom no formal betrothal had been entered into.

The evils of the clandestine marriage were common throughout Christendom. Church Councils and temporal powers were endeavoring constantly to devise restraints and administered

severe punishments to effect their purpose ,but to little avail.

The Church spent a great deal of time and force in endeavor-  
-ing to regulate the degrees of consanguinity within which  
marriages should be privileged. There was no real lay juris-  
diction in marital affairs, the ecclesiastical Judge alone  
had real jurisdiction over questions of marriage. The insti-  
tution of the publication of banns had some influence in  
checking clandestine marriages . It was in some respects  
a substitute for the modern method of registration and offi-  
cial licensing. However, weakness existed from the fact that  
that the Church was lax in its enforcement of its decrees .

In the year 1538 parish registration of births, marriages  
and deaths were first introduced "and this gave publicity to  
marriage relations".

The Protestant Reformation in Germany had much to do  
with matrimonial law but two centuries elapsed before any law

restraining the evils ~~resulting~~ from clandestine marriages was of much influence. *in England.*

Luther held that all betrothals ,without regard to whether made de praesenti or de futuro,if made public and consented to by the parents,should be regarded as valid marriages and as indissoluble. Also,he held,that the fulfillment of a betrothal.whether made before witnesses or not, but with parental consent,was binding. Yet his remedies did not cover the entire ground of the clandestine evil. There is not time,nor is it necessary to consider here all the differences which existed between the Canonical and lay rules regarding marriages,but there grew ,on this account, a great perplexity between the "illegality and validity existing in the same contract." The conscience might be bound and in law the marriage be null and void. The teaching of Luther had the effect of giving to marriage a higher ethical meaning

than had existed, although that celibacy was a higher and purer state than marriage was long maintained by those of great authority and prominence.

Perhaps we can gain an idea of the great errors existing concerning marriage in a comparative late time, in no other way better than by a knowledge of the fact that in the age of Queen Elizabeth "in a single diocese, in a period of six years, twenty eight divorces or voidances of contract occurred in infancy or early childhood." The ages of the parties contracting these marriages varied from two years to thirteen. These cases came up for confirmation or annulment, and it is fair to say that it is an index only, of the number that never came up for determination. We are told that sometimes the infant bride or bridegroom was brought before the priest for solemnization of the marriage in the arms of some one. When we consider that these alliances were made for a money

or property consideration between the parents it is difficult "to imagine a more absurd travesty on holy wedlock," than then existed under the sanction of the priesthood.

We come to the middle of the Seventeenth Century before the ideas relating to the "temporal nature of marriage gained ascendancy in England," and then only for a brief time did it maintain its position, during the Commonwealth. The act of 1653, is of exceeding great interest, not only as showing the statesmanship of Cromwell, but also indicating the revolt of the Puritans, particularly the Independents, "against the unnatural union between church and state," and as an index of their great hatred of the "formalism and ceremonial of the Romanist party in the Established Church.

It is the foundation of our New England laws concerning matrimony. It perhaps is an expression of the desire of an intense religious party to separate all worldly things

from ecclesiastical control.

By the act of 1653 it was required that a civil ceremony be performed before a justice of the peace. The banns were required to be published ,in due form, and a proper certificate obtained from the "parish register." The persons to be united in marriage were to present themselves before some justice of the peace in the same county where the publication was made ,consent of the parents was necessary where the parties were under twenty-one years of age. In accordance<sup>with the idea</sup> that marriage was a "worldly thing" the clergy were deprived of "jurisdiction in matrimonial causes, and it was placed in the hands of the justice of the peace." All matters concerning matrimonial controversies and contracts were no longer to be considered and determined before an ecclesiastical tribunal or judge, but were referred to the justices of the peace in the proper corporate districts.

So strong was the sentiment against divorce that no provision was made for its enactment. Nevertheless strict laws were passed to procure the punishment of those who aided in procuring fraudulent marriages. The one distinguishing feature of the act of 1653, known as the Cromwell act, was that it provided a method "to secure publicity with a safe and perfect record". It provided for a competent register in each parish and provided for the due publication of banns, and for a statement by the contracting parties of their age, their residence, their parentage, which information was to be included in the notice to be declared. After the publication of the banns the parties were required to procure the register's "certificate of the fact and to proceed to a justice of the peace, before whom the ceremony was solemnized and who gave a proper certificate to the wedded parties.

But after the restoration it was sought to replace the laws

in force during the Commonwealth regulating marriage by the "laws in force before the Revolution." The idea gained by the act of 1653 gained much unpopularity on account of the publicity it provided for in individual matters. But so great was the benefit derived from its enforcement that Charles the Second caused a "statute legalizing civil marriages" to be passed during the first year of his reign. There was after this a law passed requiring the clergy to keep registers in order that the direct tax which was to be paid by those forming marriages, according to a recent enactment <sup>might be collected,</sup>. Certain Churches claimed to be exempt from this "episcopal visitation" and in consequence claimed that they were free from the operation of the statute. and the priests over these churches "allowed marriages without banns or license". Another act was passed requiring that all marriages should be solemnized only after publication of banns, or after obtaining the bishop's license " under a fixed penalty. But this measure failed .



Many of the clergy evaded the requirements of the law and marriages were allowed without regard to the requirements of the law. In consequence a great evil arose under the name of the "Fleet" marriages, for gain to the clergy. Notices of ~~mar~~ places where marriages could be solemnized were posted in many places and encouragement was given to an evil for the sake of an emolument to the ministers and clergy. The word "Fleet" marriages arose from the prison by that name, and in the walls of which were incarcerated persons condemned for debt. The prison was small and its accommodations were not sufficient for all who belonged there. In the neighborhood persons were allowed to take up their dwellings if they would give bond for appearance at the prison when their appearance was required. Belonging to the Fleet prison was a chapel and here the vicar or priest, who, by oversight or otherwise was not named in the act regulating marriages, obtained <sup>funds</sup> prices for his maintenance

through the performance of marriages at the chapel; hence arose the name of "Fleet" marriages as covering a class of marriages procured through the unscrupulous clergy.

In 1753 another statute was enacted whose object was to give publicity, and the object desired was gained. By this act the so-called "Fleet marriages were destroyed; it compelled "a regular publicity after compliance with certain preliminary forms ." The principle of parental consent was established ,and from this date verbal contracts of marriage ceased to have any binding effect in England; solemnization could not be enforced and damages for breach of promise ,recoverable by action, became the only relief in such cases. "

This act known as the Hardwicke act proved to be a means of causing injustice in many respects, and in 1836 a signal victory was won by the act of that year ,in which

provisions for mariages by civil and ecclesiastical form were made;-by publication of banns,by certificate procured from the superintendant of registration,which was equivalent to the publication of banns. Rules regulating the consent of parents or guardians were passed . Suffice it to say that sufficient publicity was given to the marriage contract.

and "Thus English marriage ends,as it began,in a simple contract; but the state has succeeded in imposing upon it the condition of publicity--a task which the church first attempted but failed to accomplish".

Coming now to the history of marriage in the United States we find that in the early history of the colonies the abundant opportunity afforded for reform in law and custom was taken advantage of in matrimonial matters along with others.

It would be a long task and a comparatively useless one to note the growth in all its details of the laws governing this part of the early institutions of the colonies. Suffice it to say that that there was a strong force in favor of granting all ceremonial and regulative customs to the State. In place of confusion and complexity arising on this ground, there was simplicity. In New England "civil registration and uniform theory of marriage tend at once to prevent the manifold evils growing out of a lax and uncertain law". The ideas which found lodgment among the New Englanders were those which later found expression in the time of Cromwell and which we have treated of

heretofore to some extent. The early colonial laws ,generally required that all marriages should be celebrated before a justice of the peace or other magistrate, sometimes under penalty of nullity for those solemnized in any other way!"

But here the Common-law marriage,"by private ~~consent~~ was valid" where no law was in existence to the contrary. We are at a loss to know the origin of the wise legislation in regard to marriage at so early a date in the New colonies, unless we conclude that it came from Holland as an outgrowth of the customs of the Low Countries. For, two of the Netherland ~~previnee~~ provinces as early as in 1580 had established civil marriage! In time the laws and customs in these colonies became more tolerant and marriages were permitted to be performed by the ministry, and liberal rules were given to the Quakers and other religious bodies desiring their own peculiar customs in this respect. We are much indebted to these early forefathers

for their care and thought in reference to the regulation of the marriage contract and the observances of its ceremonies. Careful regulations in regard to registration, publication, parental consent were provided for. Everywhere these requirements were carried into effect by officers whose duties ~~it was~~ were prescribed by laws and regulations. However, the Common-law marriage was regarded as valid unless acts concerning its nullity were specially provided. In some of the early colonies *either sufficient* banns ~~or~~ license ~~were required,~~ In Maryland no one was allowed to solemnize the marriage except "ministers of the Church of England, ministers dissenting from that Church, or Romish priests appointed or ordained according to the rites of their respective churches, or in such manner as hath been heretofore used and practiced in this State by the society of people called Quakers." This "monument of conservatism has survived to our time." In Virginia In the early colonial days the mar

riage ceremony was prescribed by law to be performed according to the rites of the Church of England. but in its early history the matrimonial laws of this colony were administered mainly by the civil magistrate. The governor's license, in Virginia, might take the place of the banns of the Church. And we might follow the laws throughout our country's history and we find that at all times there has been much time and thought spent concerning this important institution. Yet that there are gross wrongs and many of them, connected with our marriage laws is not doubted by any one. Wrongs which seem at times, insurmountable; yet when we consider the long period of growth our institutions have had, the evils that have been largely overcome we should not despair of the future of our marital regulations. All parts of legal administration are defective. New laws regulating our commerce, and the administration of our public affairs are constantly demanded, and

our domestic relations are only in keeping with the rest of our conditions in their imperfection. Throughout our country most of the States have laws regulating registration, parental consent and age and the proper obtaining of license. Yet one of the great hindrances in the way is that of the granting of the validity of the Common-law marriage, by a silence in regard to it. "Marriage is everywhere favored," and for this reason is the irregular marriage recognized. It is a serious question whether some individuals might not better, lose their property rights and their respectable standing in a community rather than that the entire community suffer on account of the leniency of the Courts in this respect. Everywhere has the decision and adjudication of the rights of married persons been relegated to the Courts and this is a vast improvement over allowing legislatures to decide on <sup>these</sup> individual matters. There is room, in most States for stricter



regulation in regard to obtaining of license. The time for examining into the reasons why parties should not become husband and wife is not given sufficient consideration in most States. It would seem a wise provision that would require notice that license to wed would be asked for, and notice of such intention be posted or published sufficiently long before the date ~~an~~ which such license would be sought, in order that any objecting might have an opportunity to make his objections known. In this way license without consent of parents, would not be so easily procured. Or an affidavit of responsible persons might be required, in addition to the sworn statement of the parties applying that the parents' consent was given.

There are many ways in which the procuring of license might be guarded and safety given to the proper requirements being met. The age of persons who are qualified to marry should not be less than the age of majority, for there ought to be as

as great maturity of thought required of those entering so important a relation as is required to attend to property rights. The ceremonial regulations might well be improved, also. While we may never hope to reach a time when all would be willing that the ceremony should be performed only by a civil magistrate, yet there ought to be such regulations to see that no impostor under the authority of any sect, without regard to standing and qualifications, should <sup>unite</sup> ~~untie~~ a couple in matrimony. There ought to be regulations in reference to persons going from one state to another, to escape the requirements of his own laws. But it is needless to mention all the reforms in sight, and let us consider another branch of the subject which is demanding so much attention and legislation at the present time, Divorce.

Along with the union of man and woman came their separation after union. "The total or partial dissolution of a marriage by the State is called a divorce", according to the definition given in the American and English Encyclopedia of Law.

The results of recent research show that among low races wonderfully well developed systems of unwritten law exist on the affairs of life, among them on the subject of divorce. In many instances these laws -in their detail, stability and regard for equity are a surprise. Post has classified the laws of divorce among the rude peoples as follows: First: Often among rude races, "particularly where the genealogical organization is little developed or is in process of decay, the marriage bond is lax and is readily dissolved at the pleasure of either party. Second: Among some the opposite extreme holds and marriage is regarded as indissoluble. Sometimes this is based on religious grounds, and again it occurs <sup>in races</sup> of low

ideas and habits of life; among the Veddahs of Ceylon marriage is indissoluble save in death. Third: Between these two extremes of freedom and restraint are many intermediate phases. Sometimes the mutual agreement between the two to separate suffices. While among other tribes or races neither party can demand a divorce from the other however just his grounds may be nor however cruel may be his treatment by the other; only when he is assaulted, and by such assault his life is endangered is a separation permitted from the other. In other cases a husband may be divorced from his wife or he may even take her life if her misconduct is considered such as to warrant such a proceeding. In some cases a wife cruelly treated by her husband may seek the protection of another man with the intention of becoming his wife, and if he takes her under his care he may challenge her husband to combat and in case he is victor he may claim her as his wife.

The combat must take place in the presence of the "chiefs and friends of the parties." Many examples might be given to show that more or less strict regulations existed among the primitive races of the past and of the uncivilized of to day relative to marriage and divorce, but one more example must suffice. In Babylonia we find most complete regulations regarding the marriage and divorce proceedings. Their ideals of family life were very high. Woman was very nearly on an equality with man. "The individual ,not the family was the social unit." The laws relating to divorce and of the right to marry after divorce,were practically the same for woman as for man.

As we have seen in England ~~there was~~ much confusion arose over marriage owing to the relation of Church and State so was there much dispute and controversy regarding the question of separation and divorce. We might spend a great deal of

time and space in treating of the divorce regulations of that country and still our knowledge would be very vague and difficult to understand, so great are the entanglements between the Church and the temporal powers, and so many the disputed ~~points~~ <sup>over</sup> et mensa et thoro and the words a vinculo. The Church steadily persisted in not favoring divorce, and yet so many were the applications for separation and dissolution of the marriage bond that the Church became corrupt in endeavoring to regulate its action in this matter. Parliament was kept pretty busy and the papal influence was often brought to bear in deciding these difficulties. The liberty granted in some parts of Continental Europe after the Reformation were sought to be introduced in England but with little purpose. It is not until late in the progress of civilization that England had any definite measures in this respect. Among the strongest arguments for reform in the matters of divorce were those

of John Milton. He declared it to be a "law of moral equity," a "pure moral economical law;" so clear in nature and reason that it was left to a man's own arbitrament to be determined between God and his own conscience". However, it was the husband's grievances that most appealed to Milton's compassion. The comfort, consolation, helpfulness and companionship which should result from the marriage relation, and the loss of which he so greatly deplored, were by him, considered as the special prerogative of the husband, the wife was the one from whom all these should emanate. He wishes to return to the happy days of "yore" when self-divorce was in vogue -- for the husband. The English mind was so ruled by doctrines of the Church that no change was made in the laws regulating divorce until the 19th. Century. , and yet the rigid rules as to divorce produced its "natural fruit", "Immorality grew apace." While the temporal Judge had no power

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over divorce proceedings ,it was finally decided that while a divorce "a vinculo" deprived the wife from dower--divorce "a mensa et thoro" did not, and this law obtained from the time of Edward ~~III~~<sup>III</sup>. Before this if the woman was the guilty party she could" claim no dower." Much dispute arose in England over "void" or "voidable "marriages,which might result from some impediment ,such as affinity or consanguinity. The records are full of controversies over the right of a man to marry his deceased wife's sister,or of a union with a relative removed the seventh or twentieth or some other degree. The trouble was that the Englishman wanted for his actions in the line of divorce authority,not reason. He sought the Bible,with its imperfect interpretations,rather than to promote the well being of his countryman. Not until 1857 was an act passed which gave to England a remedy for the hardship and scandals which had long continued on account



of her indecision.

" By this act of 1857 ,which during a whole session of Parliament was stubbornly resisted ,mainly on religious grounds,the entire jurisdiction in matrimonial questions hitherto belonging to the Spiritual Courts,"except so far as relates to the granting of marriage licenses"is transferred to the Civil Courts for Divorce and Matrimonial Causes."

The law of 1857 recognizes three forms of separation. First: On petition of either consort a "complete dissolution of wedlock may be granted! The law is unjust in that while it allows a complete dissolution of the marriage bond to the husband for the infidelity of the wife,the wife is compelled to add ~~her~~ <sup>to</sup> complaint for the same offense a certain degree of cruelty. While "cruelty and desertion are given a broad meaning the woman is still at <sup>dis-</sup> ~~an~~ advantage compared with her spouse. The act provides that there must be given satis-

faction to the Court that there is no collusion between the parties to be divorced, which is a wise provision.

The present English law provides also for "Judicial Separation" a substitute for divorce "a mensa et thoro". which by this act was abolished. In such case the wife is regarded as "feme sole" with respect to her property rights and <sup>her</sup> husband is not held responsible for her debts unless alimony is granted.

The law also provides for "Magisterial Separation" ; by this provision the wife is protected in her property rights the same as a "feme sole". In 1886 further provision was made for the wife obtaining "Magisterial Separation", by which the husband is required to pay to the wife such weekly stipend not exceeding two pounds, "as the justices may consider is within his means". By this order a deserted wife is "secured in the enjoyment of her own property or is given a just share in her delinquent partner's goods." "Magisterial Separation" has in all respects the force of "a Judicial Separation on

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the ground of cruelty".

Coming now to the history of divorce in the United States we find that liberal ideas governed in this as in other matters among the early settlers of our Commonwealth. A dissolution of the bond of matrimony was granted for a number of causes,--such as cruelty, desertion, infidelity and yet there remained among these early legislators a prejudice toward granting woman the same liberties as man. Connecticut treated the husband and the wife the same. Rhode Island delegated her action in divorce to the legislature and there it rested for a number of years. It is needless to go into detail in relation to the early history of our divorce regulation for this paper is already beyond its proper length.

We have this to congratulate ourselves upon; "that marriage and the family are emerging as purely social institutions." We are liberated in a large measure from the mediaeval hindrances which were for so long a stumbling -block to its interests.

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We recognize the fact "consciously or unconsciously" that the family as an institution is a result of human experience, and "human habits", and <sup>is</sup>are to be "dealt with according to human needs." While we should not neglect the authorities that have <sup>been</sup>heretofore regarded, yet we should <sup>or disobey</sup>obey those authorities according to reason and our convictions, in respect to whether or not they apply to the times and conditions <sup>of</sup>our civilization.

There is one conclusion that seems to be determined and that <sup>is</sup>our divorce laws are defective; proof of that exists in the fact that we are all the time seeking to amend them, hoping to make them better. Some hold that the fewer the grounds of divorce the fewer the divorces. Others hold the contrary doctrine. We might consider these opinions with profit for a short time. Professor Wilcox, after examining the point as to what result legislation has had upon granting divorces by increasing the number of grounds upon which divorce may

be allowed says, the number of divorces granted can not be accounted for by the number of grounds permitted. In 1880 New York granted divorce for but one cause, New Jersey two, Pennsylvania four causes; "yet on the average that year for each 100,000 married couples New York was granting 81 divorces, New Jersey 68 and Pennsylvania 111. The conclusion remains "that limiting the causes increases the number of divorces in which the causes that remain, but without materially affecting the total number. "A certain proportion of the married couples in the three states desired divorce, and was willing to offer the evidence required in order to obtain the decree. The number of causes then, seems to have affected the grounds urged for divorce ~~about~~ /in no large degree the total number. " However this problem is very complex and hard to determine.

We must regard divorce as a remedy for, an evil, depend-

ent"upon social forces far beyond the reach of the statute maker". Good laws ,however,may have a tendency to check hasty marriages and divorce,and th us assist in curing the evil so prevalent in our country,although when a wise remedy prescribed for innumerable ills. There might be more strict regulations in regard to the time the d ivorced parties should remain single before contracting marriage than are provided for in most of the States. There might be a provision,where there is none,in regard to the so called ex parte cases,where only the party suing appears, by having it the duty of the County Attorney or some other person competent to perform the duties, appointed by the Court to investigate the case in respect to the absent party. There might be,and undoubtedly will be in time more uniformity among the States in regard to notice, time of <sup>required</sup> ~~requirement~~ to remain unmarried after the marital relation is absolved,and in respect to "bona fide" residence

before divorce can be granted.

Yet the greatest remedy lies in the educational forces. More important must be regarded a tie which binds together two human beings for life, Hardly as much thought sometimes is given as to the choice of a husband or wife as is given to the consideration of a piece of land in Western Kansas. The idea that one must marry in order to escape the ridicule of being called an "old maid" has long since past. The time has come when no woman is obliged to marry "for support." Undoubtedly many attribute the evil of divorce to this source, for woman is no longer bound to a man for a money consideration. She can make her own money and enjoy it without "fear or molestation!"

The College woman receives her share for the unhappy state of affairs, but if we look beneath the surface we shall find that the College woman has not so much to "answer for" as have some other causes. In fact the educated woman, becoming

capable is usually willing and anxious to give herself to a life of service, and if she meets the man whom she loves and for whom she has respect and in whom she has confidence she is generally more willing to cast her lot with his and work with him than to take her life alone. And if the statistics of the College women, in respect to their married life, were examined it undoubtedly <sup>would</sup> give a good showing in regard to family life and duties. There are a number of forces which tend to destroy the family happiness and even family life. There is the wild and uncontrollable desire for luxury and high living which are incompatible with family life and service, which are a great destroyer of its tranquillity and comfort. There is the great scramble for wealth which takes men's minds from domestic responsibility and care: there is fashion which does not harmonize well with many children and constant care: and then perhaps greatest of all there is the false modesty



relative to all sexual subjects which fosters and nourishes a secrecy in those matters which are more important to know than almost anything else, and which so often are a forbidden subject between parent and child and between teacher and pupil. There is an improvement along these lines, as evidenced in the change in the courses of many of our educational institutions and by the number of publications that have arisen in behalf of this most neglected subject.

But after all has been done in the way of legislation a through educational forces in the schools, and- there must be a self education in the marital relation as well as in other relations. No husband and wife can long live together happily or on agreeable terms unless they seek to help and assist each other, overlook the faults, and recognize the good qualities in one other. We are, it is hoped, at the beginning of a new time in the matter of all that pertains to the marital relation

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The time is ripe for a general enlightenment upon all questions which touch the relation of husband and wife. Woman already is practically recognized as ~~hhe~~ equal of man in most of her relations, especially in the family. Parent and child are on more intimate terms and enjoy a greater confidence and we may hope for the time when the sacredness of marriage will be more strongly guarded, when the seeking for divorce will be a rare occurrence, when there will be more ~~more~~ consideration given to the choice of a husband or wife, and when the family as a whole will be so strongly founded upon the principles of love and honor that it will be in very deed and truth the ~~stre-~~ strength and support of the State and the Nation.

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